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No. 98-723

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,

Petitioner,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondents acknowledge that the principal legal issue presented by the petition is the subject of conflicting decisions in six Circuits – with three Circuits lining up on one side and three on the other. The respondents even vividly described this conflict in their brief below, when they told the Second Circuit that "[o]ther Circuits, *disagreeing with this Court*, have adopted a version of the conduct test that is more permissive (although not so permissive as the SEC's)." Defendant-Appellees' Brief in Response to Brief of the SEC, pp. 9-10.

Seeking to evade consideration of the contentious legal issue by this Court, the respondents assert here that the conflict is "narrow" and that the "Circuits' standards are converging" (Br. in Opp. 6). This would be news to the Seventh Circuit, whose recent description of the conflict (quoted *in extenso* at pp. 10-11 of our petition) views the disagreement as a "spectrum" with widely different "extremes." See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 (7th Cir. 1998).

The respondents also declare that the facts of this case would have resulted in dismissal of the complaint even in the Third, Eighth and Ninth Circuits. See Br. in Opp. 13, 14-15. The SEC plainly did not agree with that conclusion. The SEC's brief in the court of appeals – which we reproduce as Appendix A to this Reply – urged the Second Circuit to find that there *is* jurisdiction on these facts in an American federal district court. Indeed, even the opinion of the court below recognized that this case involves "activity" in the United States that "directly cause[d] the harm to the foreign interest, which has in the past been the key element of litigation involving the conduct test." Pet. App. 22a.

The decision of the Second Circuit in this case, rather than demonstrating a "convergence" with the standards of other courts of appeals, manifested a widening gap between the standards for jurisdiction applicable in the Second Circuit and the standards applied in the Third, Eighth and Ninth Circuits. The Second Circuit *added* a precondition for jurisdiction that it had not explicitly prescribed previously – *i.e.*, that a "relevant interest of the United States was implicated" by the allegedly fraudulent conduct. See Pet. App. 23a. Because it found no such "relevant interest," the Second Circuit refused to authorize jurisdiction even though "a misrepresentation is made in the United States and reliance occurs on U.S. soil." Pet. App. 27a. This is squarely contrary to the decision reached by the Ninth Circuit in *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983).

In the *Grunenthal* case a German corporation purchased securities in a Mexican corporation controlled by a Swiss citizen and a Mexican citizen through several Bahamian trusts. 712 F.2d at 422. The only conduct in the United States was a meeting that had taken place in Los Angeles, where the sales agreement was executed and misrepresentations first made abroad were repeated. 712 F.2d at 423. The Ninth Circuit recognized that, as was arguably true here, "the allegedly fraudulent conduct occurred in this country by happenstance" (712 F.2d at 425), but it nonetheless held that there was subject-matter jurisdiction under Section 10(b).*

Finally, the respondents mischaracterize our contention that the Second Circuit's cavalier rejection of Regulation S warrants review of the second issue presented in our petition. We did *not* claim that the SEC is entitled to deference on the question of whether a federal district court has jurisdiction over a particular securities claim. See Br. in Opp. 19-20. Our contention is that the SEC's judgment regarding when, under the Securities Acts, a security must be registered – the subject of Regulation S – is entitled to deference. Even if that judgment impacts upon the reach of the agency's jurisdiction, the agency's conclusion is entitled to deference from the courts. See *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986); *Fleischmann v. Director*, 137 F.3d 131, 136 n.2 (2d Cir. 1998), *cert. denied sub*

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* Contrary to the respondents' representations (see Br. in Opp. 12), the Ninth Circuit did not overrule or narrow *Grunenthal* in *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996). In *Butte Mining*, the fraud was "committed by foreign individuals on a foreign corporation in a foreign country." 76 F.3d at 290. The plaintiffs' claim for jurisdiction rested on a land transaction in the United States that predated the alleged securities fraud. That is a far cry from *Grunenthal* or the facts of this case.

nom.., Seahorse Coastal Assistance & Towing v. Fleischmann, 119 S. Ct. 444 (1998).

We note, finally, that there may be no stronger proof of the existence of an important conflict among the Circuits than the fact that the respondents took almost 20 pages of their Brief in Opposition to provide a strained and tortuous explanation of why there is no conflict. And it is, of course, true in any case in which a legal standard is applied to facts of record that a court's decision is "fact-specific." See Br. in Opp. 14. If a court's appraisal of particular facts under a disputed legal standard were a bar to review of the standard in this Court, there would never be any opportunity for this Court to consider the legal standards applicable to the many aspects of litigation in the federal courts.

For the above reasons and those stated in our petition, a writ of certiorari should be granted on both issues raised by the petition.

Respectfully submitted,

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APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-7900

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.
Plaintiff-Appellant,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

ISSUE PRESENTED AND SUMMARY OF THE POSITION OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to the Court's request that the Commission discuss "the jurisdictional issues" in this appeal. The district court dismissed, for lack of subject-matter jurisdiction, the plaintiff's claims seeking recovery under the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and under the registration provisions of the Securities Act and the Investment Company act of 1940.

The plaintiff, a foreign corporation, alleges that it was induced to purchase securities by misrepresentations made by a stockbroker in London in telephone conversations with the plaintiff's sole shareholder while the shareholder was temporarily living in Florida. Although, as a result of these misrepresentations sent into the United States, the plaintiff's sole shareholder made six separate purchases over a period of six weeks while in Florida, the district court, in light of the foreign aspects of the transactions, dismissed the complaint for lack of subject-matter jurisdiction.[1]

The Commission believes that the antifraud provisions of the securities laws are applicable when, as alleged here, misrepresentations are transmitted into the United States, directed to a person in the this country to induce him to buy securities. This is particularly so when the person is living here for a significant period of time (in this case, at least six weeks and apparently for a substantial part of the year).

With respect to the registration provisions of the Securities Act, the applicability of those provisions in the international context is governed by commission rules contained in Regulation S. Under those rules, absent an exemption from registration, the Securities Act registration provisions are applicable when, as alleged in this case, solicitations to purchase securities are made to a person in this country by telephone from abroad. The principles of Regulation S should generally also be applied by analogy to the coverage of the Investment Company Act.

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[1] The district court also dismissed the complaint for lack of personal jurisdiction over some of the defendants and on considerations of forum non conveniens. The Commission's brief addresses only the issue of subject-matter jurisdiction as to which the Court requested the Commission's views and the Commission possesses special expertise.

Although this is a private action, the principles adopted by the Court in deciding subject-matter jurisdiction in this case may be applicable also in comparable law enforcement actions brought by the Commission. Accordingly, the Commission's own law enforcement interests are implicated here.

STATEMENT OF THE CASE

The plaintiff, Europe and Overseas Commodity Traders, S.A. ("EOCT"), purchased shares in a foreign investment company, Paribas Global Bond Futures Fund (the "Fund") (A. 13 ¶¶29-30; A. 68 ¶¶7-8).[2] The shares were not registered under the Securities Act, and the Fund was not registered under the Investment Company Act, nor, since it was a foreign company, could it have registered under that Act.[3] EOCT, the plaintiff, is a privately held investment firm incorporated in Panama with offices in Monaco. Alan Carr, a Canadian citizen, is EOCT's sole shareholder (A. 7 ¶¶2-3; A. 62). The district court found that Carr was residing in the United States during the period in question. *See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 940 F. Supp. 528, 531 (S.D.N.Y. 1996).

In an affidavit Carr states that he resides in Florida for a substantial part, though less than half, of each year (A. 173 ¶2; *see also* A. 173, 174-77 ¶2, ¶¶6-16; 293 ¶4; 295 ¶8). The record does not show where he resides the rest of the year, although Carr states that he spends only up to one month of the year in England (A. 173 ¶2; A. 175 ¶8) The

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[2] "A. __¶__" refers to the page and numbered paragraph, if any, in the Joint Appendix. "Br. __" refers to the defendants-appellees' brief.

[3] *See* Sections 7(d) and 8(a) of the Investment Company Act, 15 U.S.C. 80a-7(d) and 80a-8(a).

purchases were made through a brokerage account opened by EOCT a year earlier, in October 1992, at the London Office of Banque Paribas, a French bank, referred to in EOCT's complaint as "Banque Paribas London" (A. 9 ¶10; A. 34 ¶1; A. 67 ¶5).

The Fund, the securities of which the plaintiff purchased, is incorporated and headquartered in Luxembourg (A. 72 ¶1), and is managed by Paribas Asset Management Ltd., a Bahamian corporation that is alleged to be controlled and owned by Banque Paribas (A. 8 ¶6; A. 72 ¶2). The Fund invests in a diversified portfolio of fixed income and currency derivatives (A. 72 ¶2). Its shares are traded exclusively on the Luxembourg Stock Exchange (A. 73 ¶3), and an affidavit filed by an officer of Paribas Asset Management states that he knows of no investors in the Fund who are U.S. citizens or residents (A 73 ¶4; A 76 ¶3).

Carr, on behalf of EOCT, made seven purchases of shares in the Fund totalling $1,788,805 (A. 10 ¶15). The first purchase, of approximately $284,000, was made in early to mid-October 1993. The parties dispute whether the first purchase was made while Carr was in London or in Florida, but the district court found that this purchase was made while Carr was still in London. 940 F. Supp. at 531. We will accept for the purposes of this brief, without taking a position on this factual dispute, the district court's finding that the first purchase was made in London and the consequent conclusion that the federal securities laws are not applicable to that transaction.[4] It is undisputed that the six subsequent purchases were made between October 14 and November 25, 1993 by Carr from Florida (A. 65, 68 ¶8; A.

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[4] While it is not reflected in the district court's opinion, it appears that five of the ten units comprising the first purchase were actually ordered by Carr from Florida (A. 238f ¶6 and n.3).

177 ¶16; Br. 6-7). These six purchases were made in telephone calls between John Arida, an employee of Banque Paribas in London, and Carr in Florida (A. 68 ¶8). Some telephone calls were initiated by Arida and others by Carr (A. 68 ¶8).

The value of the fund declined in the months that followed EOCT's purchases (A 11-12 ¶¶23-26). EOCT then initiated this action in the United States District Court for the Southern District of New York against Banque Paribas London, Paribas Asset Management, the Fund, and Arida. EOCT's complaint alleges that Arida made misrepresentations to Carr concerning the nature and management of the Fund, for which recovery is sought under Section 12(2) of the Securities Act, 15 U.S.C. 771(2), Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder 17 C.F.R. 240.10b-5 (A. 15-17).[5] The alleged misrepresentations were made by telephone during both the initial and subsequent purchases (A. 176-77 ¶¶14-16; A. 293-94 ¶4).

In addition, with respect to all of these transactions, EOCT's complaint alleges the sale of unregistered securities, seeking relief under Section 12(1) of the Securities Act, 15 U.S.C. 771(1),[6] and the sale of shares in an unregistered foreign investment company in violation of Section 7 of the

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[5] Specifically, EOCT alleges that Arida misrepresented that (a) the Fund was overseen by Banque Paribas' proprietary trading desk; (b) the investors' capital was traded along with Banque Paribas' own capital; and (c) the Fund traded securities based primarily on technical as opposed to fundamental considerations (A. 15).

[6] Since the time of the transactions involved in this case, the Securities Act has been amended so that Sections 12(1) and 12(2) are now designated as 12(a)(1) and 12(a)(2). In this brief the Commission will use the old designations in place at the time of the transactions.

Investment Company Act, 15 U.S.C. 80a-7 (A. 13-14). EOCT also makes various state law claims (A. 18-28).

The district court concluded that it lacked subject-matter jurisdiction over EOCT's fraud claims because it found that the fraud was based in London and any misrepresentations made at the time of the six Florida purchases were "merely a continuation" of or were "ancillary" to those made during the initial purchase in London. 940 F. Supp. at 535. The district court did not address subject-matter jurisdiction over EOCT's registration claims, although it dismissed all of the plaintiff's claims.

The district court also ruled that it lacked personal jurisdiction over some of the parties and that the case should be tried in Great Britain based on considerations of forum non conveniens, including an English forum selection and choice of law provision in the customer agreement between EOCT and Banque Paribas.[7]

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[7] *See supra* p. 2 n. 1. In addressing the issue of forum non conveniens the parties and the district court have considered what weight, if any, to give to the choice of forum and choice of law clauses in the customer agreement between EOCT and Banque Paribas. These clauses selected English courts and English law. Based on these clauses, the district court concluded that "English law must govern this case in an English forum." Although this conclusion may be consistent with Second Circuit case law (*see Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993)), the Commission's view, as recently expressed in the *Lloyd's* cases in the courts of appeals for the Fifth and Ninth Circuits, and in a district court in the Fourth Circuit, is contrary to the position of this Court. The Commission's position is that the antiwaiver provisions of the Securities Act and the Securities Exchange Act preclude a United States court from enforcing choice of forum and choice of law clauses that operate in tandem to prevent the plaintiff from pursuing a claim under those Acts in any forum. A panel of the Ninth Circuit agreed (2 to 1) with the Commission's position, but that court will rehear the case *en banc*. *See Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir.), *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997) (oral argument is scheduled for October 23,

ARGUMENT

THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION OVER THE PLAINTIFF'S SECURITIES FRAUD AND REGISTRATION CLAIMS.

A. The Antifraud Provisions Of The Securities Laws Are Applicable When, As Alleged Here, Misrepresentations From Abroad Are Directed To A Person In The United States To Induce Him To Buy Securities.

When considering whether Congress intended the subject-matter jurisdiction of the district court to extend to transnational securities frauds, courts focus on whether the party asserting jurisdiction has met the requirements of either the "effects test" or the "conduct test."

1. Effects In The United States

The courts have held that under the effects test, which requires a substantial impact in the United States, federal courts have jurisdiction where fraud, although occurring abroad, has an impact on stock traded in a United States market. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir. 1995) (*citing Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir.), *modified with respect to the issue of liability of one set of defendants*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969)), *cert denied*, 116 S. Ct. 702 (1996). The district court in this case determined that there was no jurisdiction under the effects analysis

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1997). A panel of the Fifth Circuit rejected the Commission's position. *See Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997). The district court in the Fourth Circuit agreed with the Commission, but was reversed by the Fourth Circuit (in an appeal in which the Commission did not participate). *See Allen v. Lloyd's of London*, 1996 WL 490177 (E.D. Va. Aug. 23, 1996), *rev'd*, 94 F.3d 923 (4th Cir. 1996).

because the Fund's shares are not traded in a United States market and there was no other substantial impact in the United States. Although it is arguable that the effects test is nonetheless satisfied by the substantial effects of the alleged misrepresentations on Carr in the United States, we submit that, regardless of whether the effects test is satisfied, jurisdiction exists in any event under the conduct test.[8]

2. Conduct in the United States

Under the conduct test, a federal court has subject-matter jurisdiction if (1) the defendant's activities in the United States were more than "merely preparatory" to the securities fraud and (2) these activities or culpable failures to act within the United States "directly caused" the claimed losses. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d at 122 (citations omitted).

While it is sometimes stated that the purpose of the conduct test is to protect foreigners residing outside the United States if acts or culpable omissions occur within the United States, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), the conduct test is also used to protect persons in the United States from fraudulent representations that are transmitted into this country from abroad, *see, e.g., Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 526-27 (8th Cir. 1973); *Doll v. James Martin Associates Ltd.*, 600 F. Supp. 510, 519 (E.D. Mich. 1984); *SEC v. Capital Growth Co. S.A.L.*, 391 F. Supp. 593, 597 (S.D.N.Y. 1974).

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[8] This conclusion does not necessarily mean that the plaintiff is entitled to litigate its claims in the United States. To be able to do so it would also have to establish personal jurisdiction over the defendants and prevail on the forum non conveniens issue.

The primary focus of the conduct analysis is the location of the fraudulent conduct that caused the victim's loss. "Several courts have found [in securities fraud cases] that making phone calls or sending mail to the United States should be deemed conduct within the United States for jurisdictional purposes in transnational cases." *Tamari v. Bache & Co.*, 547 F. Supp. 309, 315 (N.D. Ill. 1982) (a commodities case), *aff'd*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984).[9] Here, the defendants allegedly made misrepresentations during phone calls between Arida in

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[9] *See also Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d at 421 n.18 (for the purposes of subject matter jurisdiction under the federal securities laws, "[b]oth the place of sending and the place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used ***."); *Travis v. Anthes Imperial Ltd.*, 473 F.2d at 524 n.16 (same); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326; 1335 (2d Cir. 1972) (telephone calls and sending mail may be deemed conduct within the United States for subject-matter jurisdiction purposes in federal securities cases); *Doll v. James Martin Associates*, 600 F. Supp. at 520 (in securities cases "the transmission of the letter to Ann Arbor [from Bermuda] was in and of itself a sufficient act to create subject matter jurisdiction***."); *Venture Fund (International) N.V. v. Willkie Farr & Gallagher*, 418 F. Supp. 550, 554 n.8 (S.D.N.Y. 1976) ("For purposes of determining whether subject-matter jurisdiction exists in a securities fraud action, telephone calls to the United States may be relevant domestic activities."); *SEC v. Capital Growth Co.*, 391 F. Supp. at 597 (making telephone calls and sending mail to the United States may be deemed conduct within the United States for purposes of subject matter jurisdiction under the federal securities laws). "Presumably everybody would agree that the making of an offer from another country into the United States by mail or telephone is subject to [Sections] 5 and 17(a) [of the Securities Act] even though neither the seller nor an agent of the seller sets foot in the United States" for purposes of both the conduct and effects analysis. American Law Institute, Federal Securities Code §1905 comment 3(b) (1980). *See also* Federal Securities Code §1905 comment 1(b)(ii) (discussion of *Leasco*).

London and Carr in Florida.[10] EOCT has alleged that defendants made the fraudulent representations in the United States in order to induce it to make six purchases of Fund shares. And these misrepresentations are the alleged direct cause of plaintiff's losses.

The district court nonetheless decided that it did not have subject-matter jurisdiction over EOCT's fraud claims under the conduct analysis because it found that the fraud complained of was not based in the United States. It reasoned that "this Court is guided by the principle that direct causation depends 'not only on how much was done in the United States but also on how much***was done abroad.'" 940 F. Supp at 535 (*quoting IIT v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir. 1980) (footnote omitted in original)). The district court went on to state that the defendants' activities in the United States "are outweighed by the acts that were done abroad – the establishment of the account, the initial purchase order, and the actual purchases with the funds in the account – which essentially constitute the core of the transaction." The communications between Arida and Carr while Carr was in Florida were, according to the trial court, "only ancillary to the initial fraud in London and therefore can not be said to have directly caused plaintiff's loss." *Id.*

We believe that the district court erred in two respects in failing properly to focus on the precise violative conduct alleged here. First, the court failed to view each of the purchases of Fund shares as a separate fraudulent trans-

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[10] Defendants suggest (Br. 21-22) that the court in *Koal Industries Corp. v. Asland, S.A.*, 808 F. Supp. 1143, 1155 (S.D.N.Y. 1992) held that a telephone call to the United States does not constitute conduct in this country. There was no indication in *Koal*, however, that misrepresentations were made during the telephone call, which is perhaps why the court characterized the call as "a preparatory act."

action. The plaintiff made six separate purchases of Fund shares while Carr was in the United States, and it alleged that misrepresentations were made in the United States to induce these purchases (A. 176-77 ¶¶14-16). The fact that there was an earlier purchase in London is irrelevant to whether there is subject-matter jurisdiction with respect to the subsequent six transactions.

Second, the district court failed to focus on the conduct that constitutes the violations, that is, the defendants' alleged misrepresentations. In this respect, the court's analysis is contrary to the type of analysis used in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 987, where this Court held that United States jurisdiction should extend only to cases where the *fraudulent* acts occur in the United States and not to those cases where mere *preparatory* acts occur here. In the present case, the conduct that is alleged to have occurred in the United States consists of the fraudulent acts that induced Carr to purchase additional Fund shares. Far from being preparatory or ancillary, as the district court concluded, this is the precise fraudulent conduct that plaintiff alleges to be the direct cause of its losses. The district court not only failed to follow the clear guidance of *Bersch*, but stood *Bersch* on its head by reviewing preparatory or ancillary conduct abroad, including opening an account in London and internal communications made to process the purchases, as more significant than the misrepresentations themselves. 940 F. Supp. at 535.

Both the district court and the defendants consider it significant that plaintiff EOCT, a foreign corporation, was not present in United States. The defendants in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d at 1337-38, made the same argument where the plaintiff purchaser was a wholly-owned foreign subsidiary of an American company and the alleged misrepresentations were made to the parent company in the United States. This Court found

that distinction irrelevant because, as in this case, the defendants were aware of the ownership of one entity by the other, and both sides accepted the foreign entity as the alter ego of its owner. *Id.* In subsequently referring to *Leasco*, this Court stated: "We have previously refused to be deterred from considering the real facts by the interposition of a foreign subsidiary of this kind." *ITT v. Cornfeld*, 619 F.2d at 920. *See also Itoba Ltd. v. Lep Group PLC*, 54 F.3d at 124 (although the plaintiff, the wholly owned foreign subsidiary of an American company, was the nominal purchaser of the foreign security in question, this distinction did not matter because it was the American parent that ultimately bore the loss).

3. Carr's Temporary Presence in the United States

Since the violative conduct alleged in this case -- mis-representations that were phoned to the United States -- constitutes conduct in this country, we submit that there is subject-matter jurisdiction under the conduct test. And, in fact, we have found no appellate case where the court failed to find jurisdiction when, as here, the misrepresentations that caused the plaintiff's losses were transmitted into the United States by telephone or otherwise.[11] But none of the cases

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[11] In one case where misrepresentations were allegedly made in the United States, *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 175-76 (5th Cir. 1990), the court refused to find subject-matter jurisdiction on a ground resembling estoppel. The court stated:

> [Plaintiffs] sought, through extensive machinations, to avoid the application of the federal securities laws and their attendant obligations in order to facilitate their investment in a foreign offering from which they were disqualified, doing so without the knowledge of the defendants. *** Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours (footnote omitted.)

upholding jurisdiction in that context (*see supra* p. 9) involved representations made to foreigners who were in the United States only temporarily. The Commission does not believe, however, that the fact that Carr was living here only temporarily is significant under the conduct analysis.

The courts recognize that "[a] finding of jurisdiction will depend upon the analysis of the particular facts in any given case." *Continental Grain v. Pacific Oilseeds*, 592 F.2d at 414. Where, as here, the basic formulation of the conduct test is satisfied by acts occurring here, courts often consider additional factors either to bolster jurisdiction or to ensure that the assertion of jurisdiction is reasonable. *See generally Restatement (Third) of the Foreign Relations Law of the United States* §416 reporters' note 2 (1987). Factors discussed by the courts include the involvement of securities of American companies or securities traded in an American market, *see, e.g., CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472, 478 (S.D.N.Y. 1989); the involvement of Americans in committing the fraud, *see, e.g., IIT v. Cornfeld*, 619 F.2d at 918; the consummation of the transaction in the United States, *see, e.g., Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); and the ties to the United States of the person seeking the protection of the securities laws, *see, e.g., Travis v. Anthes Imperial Ltd.*, 473 F.2d at 528.

In looking to these factors, courts have applied the federal securities laws in a very broad fashion where violative conduct occurs in the United States, even if the victim's ties to this country are insubstantial.[12] Foreign

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[12] The *Restatement (Third) of the Foreign Relations Law of the United States* notes that the conduct test is by far the most common basis for the exercise of jurisdiction and is generally free from controversy. §402 comment c. And subsection 1905(a)(1)(D) of the American Law Institute, Federal Securities Code would have made the provisions of the

plaintiffs, for example, have successfully asserted jurisdiction based primarily on misrepresentations made to them by foreign defendants while the parties were in the United States temporarily.[13] The only appellate cases we have identified where conduct in the United States was held insufficient to sustain jurisdiction are cases, unlike here, where the conduct in this country was merely preparatory or where the parts of a multinational fraud that occurred in the United States were minimal compared to the culpable conduct committed elsewhere.[14]

This Court nonetheless has indicated in dictum that the antifraud provisions would not be applicable where misrepresentations are made to a foreign plaintiff while visiting the United States. In *Leasco Data Processing Equipment v. Maxwell*, 468 F.2d at 1338, this Court described a hypothetical situation where a German businessman and a Japanese businessman meet in New York for convenience, and the latter fraudulently induces the former to make purchases of Japanese securities on the Tokyo Stock Exchange. Under these hypothetical facts, this Court suggested, the application of United States law might not be reasonable because the parties were here "only transitorily," such that "neither party acted with the

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Code applicable when there is "prohibited, required or actionable conduct whose constituent elements occur to a substantial (but not necessarily predominant) extent in the United States."

[13] *See, e.g., AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148, 153 (2d Cir. 1984); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 426 (9th Cir. 1983).

[14] *See, e.g., North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1053 (2d Cir. 1996); *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 6-8 (2d Cir. 1979); *IIT v. Vencap, Ltd*, 519 F.2d 1001, 1018 (2d Cir. 1975).

expectation" that United States law would apply. *See Restatement (Third) of the Foreign Relations Law of the United States* §416 reporters' note 2.

This dictum in *Leasco* has not been reflected in the holdings of subsequent decisions by this Court and other courts of appeals. Although this Court in *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d at 153, wrote that *Leasco* strongly implied that the *Leasco* hypothetical facts would not support jurisdiction, the *AVC Nederland* Court nevertheless found the federal securities laws applicable where misrepresentations were made to the plaintiff, a Dutch businessman, by other Dutch businessmen during a business trip by the plaintiff to the United States.[15] And in what appears to be the only other case involving misrepresentations made to a foreign plaintiff while visiting the United States, *Grunenthal GmbH v. Holtz*, 712 F.2d at 425, the Ninth Circuit expressly rejected the notion that the plaintiff's temporary status in the United States should preclude jurisdiction under the conduct analysis.

We believe that the antifraud provisions of the securities laws should be applicable when, as alleged in this case, misrepresentations are directed to a person in the United States to induce him to buy securities.[16] This is particularly so here, since Carr lived in the United States for a significant period of time, and apparently did so each year (A. 173 ¶2; 176-77 ¶¶14-16; A. 293-94 ¶4).

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[15] Aside from the location of the misrepresentations, the only other basis for jurisdiction in *AVC Nederland* was that the securities were "nominally American" even though "really Dutch." 740 F.2d at 154.

[16] The only exception might be the situation where a person receives misrepresentations from abroad while in the United States briefly in transit between two other countries, since he might have no reasonable expectation of being protected by our antifraud provisions. That question, however, need not be resolved in this case.

There is no question, of course, that *Americans* expect the laws of this country to protect them while they are in this country, and there is no reason why *foreigners* present in the United States should not likewise reasonably expect and receive such protection. To deny the protection of the antifraud provisions to foreign nationals temporarily in this country would create potential fraud victims who expect that they are protected by our laws when, in fact, they are not. And the policy of our securities laws should be to protect persons within the territory of the United States. In addition, a territorial approach avoids uncertainty by providing a relatively clear line between covered and uncovered conduct.

Moreover, concerns of reciprocity call for applicability of the antifraud provisions in this case. In order to encourage other nations to extend the protection of their laws to Americans located abroad, we should extend to foreign nationals temporarily in this country the same antifraud protection we afford permanent residents of the United States. *Cf. SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

B. The Registration Provisions Of The Securities Act And Of The Investment Company Act Cover Transactions Where, As Alleged Here, Solicitations To Purchase Securities Are Made To A Person In This Country by Telephone From Abroad.

In contrast to the antifraud provisions, the coverage of which is governed by principles developed in the decisional law, the coverage of the Securities Act's registration provisions in the transnational context is governed by Commission rules – Regulation S (reproduced in the Statutory Addendum). Under these rules, as explained below, the transactions in this case are covered by the

registration provisions of the Securities Act. Accordingly, absent an applicable exemption from registration, the Fund securities sold to EOCT were required to be registered.[17]

In addition, although Regulation S deals only with registration, the fact that under Regulation S these transactions are covered by the registration provisions lends support to our earlier conclusion that the transactions are subject to the antifraud provisions. It is well established that the reach of the antifraud provisions is at least as great as that of the registration provisions. *See Consolidated Gold Fields plc v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.), *cert. denied*, 492 U.S. 939 (1989); *IIT v. Cornfeld*, 619 F.2d at 921; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 986; *Plessey Company plc v. General Electric Co. plc*, 628 F. Supp. 477, 494 (D. Del. 1986); *See also Restatement (Third) of the Foreign Relations Law of the United States* §416 comment a.

In 1990, the Commission adopted Regulation S, Rules 901-904, which takes a territorial, or conduct-based, approach to the registration requirements of Section 5 of the

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[17] The Commission takes no position as to whether the defendants are eligible for an exemption from registration, such as the exemption under Section 4(2) of the Securities Act for private offerings. Whether an exemption is available is not an issue in this appeal.

Preliminary note 8 to Regulation S (17 C.F.R. preceding 230.901) provides that Regulation S does not apply to transactions in certain investment company securities. The purpose of that provision was not to *narrow* the coverage of the Securities Act registration provisions but rather, in the case of investment company securities, to *broaden* their coverage. The purpose was to allow the Commission to require registration, in the case of investment company securities, in situations where Regulation S would otherwise exclude transactions from coverage. *See* Offshore Offers and Sales (Release adopting Regulation S), Securities Act Release 6863 (April 24, 1990), 55 Fed. Reg. 18306, 18321, n.152, 1990 WL 311658 at *42, n.152 ("Release 6863").

Securities Act, 15 U.S.C. 77e. Regulation S provides, in general, that Section 5 applies to "offers and sales that occur within the United States" and does not apply to "offers and sales that occur outside the United States." Rule 901, 17 C.F.R. 230.901. Of particular significance here, the Commission has emphasized that an offer "would not be deemed to be outside the United States if made to a person inside the United States" "by a telephone call soliciting a purchase in the United States or written material offering a security being mailed or delivered to a person in the United States." Offshore Offers and Sales (Release proposing Regulation S), Securities Act Release 6779 (June 10, 1988), 53 Fed. Reg. 22661, 22666, 1988 WL 239804 at *12.

There are two nonexclusive safe harbors under Regulation S. In order to qualify for either safe harbor the transaction in question must be an "offshore transaction." Carr's purchase of Fund shares on behalf of EOCT does not qualify as an "offshore transaction" because such a transaction is defined as an offer to sell securities that "is not made to a person in the United States." Rule 902(i)(i), 17 C.F.R. 230.902(i)(i).[18] An offer made to a person in the United States includes offers made to "transient visitors" not resident in the United States. *See* Release 6863, n.115, 55

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[18] The fact that Carr made these purchases on behalf of a foreign entity, not present in the United States, is irrelevant under Regulation S. The regulation provides only one exception that allows an offer or sale made to a person in the United States to nevertheless qualify as an "offshore transaction." That exception applies only to an offer and sale to a "dealer or other professional fiduciary" who holds discretionary accounts for the benefit non-U.S. persons and to an offer and sale made to certain multinational organizations. *See* Rules 902(i)(3) and (o)(2), 17 C.F.R. 230.902(i)(3) and (o)(2). The exception for U.S. professional fiduciaries was adopted in light of the serious competitive disadvantages they might face without such an exception. *See* Release 6863, 55 Fed. Reg. 18306, 18317, 1990 WL 311658 at *19.

Fed. Reg. at 18316 n.115, 1990 SEC LEXIS 740 at *62, n.115.[19]

In light of this territorial approach, the defendants in this case were required either to comply with the registration requirements of the securities Act (absent an exemption from registration) or not offer the securities to Carr in the United States.[20]

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[19] The Commission has not defined the term. "Transient visitor" as used in Release 6863 does not necessarily refer to foreigners who are in the United States merely because they are in transit between two other countries. *See supra* at 18, n.16.

[20] The Commission similarly requires broker-dealer registration under Section 15(a) of the Exchange Act, 15 U.S.C. 78(o)(a), by foreign broker-dealers who deal with persons in this country from abroad. *See* Registration Requirements for Foreign Broker-Dealers (Release adopting Rule 15a-6), Exchange Act Release 27017 (July 11, 1989), 54 Fed. Reg. 30013, 30017, 1989 WL 258954 at *8. The Commission does not, however, require registration of a foreign broker-dealer dealing from abroad with a foreign person temporarily in the United States where the foreign broker-dealer had a bonafide preexisting relationship with the person before he entered this country. *See* Rule 15a-6(a)(4)(iii), 17 C.F.R. 240.15a-6(a)(4)(iii). This exception reflects the need for foreign persons to continue to contact their brokers while visiting the United States. It appears that Banque Paribas may not, therefore, have been required to register as a broker-dealer before offering securities to Carr in Florida. However, a foreign broker-dealer who deals with a foreign person temporarily in this country must still "be careful that any offers or sales of securities made within the United States comply with the registration provisions of the Securities Act." Registration Requirements for Foreign Broker-Dealers (Release proposing Rule 15a-6), Exchange Act Release 25801 at n.46 (June 14, 1988), 53 Fed. Reg. 23645, 23649, n.46, 1988 WL 239776 at *9, n.46. *See also* Release 27017, 54 Fed. Reg. at 30030, 1989 WL 258954 at *35 (noting that the interpretive statements in Release 25801 are being codified in Rule 15a-6(a)(4)(iii)). In addition, the Commission noted, a foreign broker-dealer's securities activities would be subject to the antifraud provisions of the federal securities laws regardless of whether it was required to register as a broker-dealer. Release 27017, 54 Fed. Reg. at 30021, n.94, 1990 WL 258954 at *15, n.94.

The policy considerations that underlie Regulation S's territorial approach to the registration provisions of the Securities Act are much the same as those that favor the application of the antifraud provisions to protect foreign persons in the United States regardless of whether they are here permanently or temporarily. In adopting Regulation S, the Commission avoided uncertainty by drawing a clear line between those transactions that are subject to the registration provisions and those that are not. Moreover, as the adopting release for Regulation S indicates, that line is best drawn at the territorial borders of the United States because those who are offered securities while they are in the United States may tend to purchase those securities with the expectation that they are offered in compliance with the protections afforded under United States law. *See* Release 6863, 55 Fed. Reg. at 18308, 1990 WL 311658 at *5.

As previously noted, by its terms Regulation S is applicable only to the registration provisions of the Securities Act. Nevertheless, we believe that the principles of Regulation S should generally be applied by analogy to determine the applicability of the Investment Company Act to transnational transactions, such as EOCT's purchase of Fund shares here. Indeed, the Commission's staff has used Regulation S as a guide to decide when the Investment

Company Act is applicable to transactions by an unregistered foreign investment company.[21]

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[21] Section 7(d) of the Investment Company Act prohibits foreign investment companies from offering their securities publicly in the United States, unless the foreign investment company obtains an order from the Commission permitting the company to register under the Investment Company Act. Section 7(d), however, does not prohibit private offerings by foreign investment companies. The staff has interpreted Section 7(d) in light of certain provisions in Sections 3(c)(1) and 3(c)(7) of the Act, 15 U.S.C. 80a-3(c)(1) and 3(c)(7) – the so-called "private offering exceptions" from the definition of an investment company. Based on those exceptions, the staff has interpreted Section 7(d) as not permitting an unregistered foreign investment company to make a private offering in the United States unless either: (1) the company has no more than 100 U.S. shareholders; or (2) all of the company's U.S. shareholders are "qualified purchasers." This interpretation has the effect of treating unregistered foreign funds comparably to unregistered domestic funds. *See* Touche Remnant & Co. (no action letter, pub. avail. Aug. 27, 1984) 1984 WL 45636; Investment Funds Institute of Canada (no action letter, pub. avail. Mar. 4, 1996), 1996 WL 102167 at *7-8 ("IFIC"); and Goodwin, Procter & Hoar (no action letter, pub. avail. Feb. 28, 1997), 1997 WL 86002 at *7 ("Goodwin, Procter").

The staff has looked to the definition of "U.S. person" in Regulation S (Rule 902(o), 17 C.F.R. 230.902(o)) to determine when a shareholder is a U.S. shareholder and therefore will either be counted toward the 100-person limitation or required to be a qualified purchaser. The staff, for example, looks to Rule 902(o)(1)(i), 17 C.F.R. 230.902(o)(1)(i), in deciding that a natural person's residency, rather than citizenship, determines his or her status for this purpose. Thus, a foreign citizen living in this country must either be counted toward the 100-person limit or be a qualified purchaser, while a U.S. citizen residing abroad would not. *See* Goodwin, Procter, 1997 WL 86002 at *9. The staff also relies on the exception to the definition of U.S. person provided by Rule 902(o)(2), 17 C.F.R. 230.902(o)(2), for professional fiduciaries who are resident in this country. *Id.* 1997 WL at 86002 at *13. The staff has also excluded from the 100-person limitation purchases by U.S. residents in an offshore secondary market. *See* IFIC, 1996 WL 102167 at *11, n.13 and Goodwin, Procter, 1997 WL 86002 at *15, n.34 (extending IFIC to Section 3(c)(7) funds). The staff has further stated that it will look to the definition of "directed selling efforts" in

CONCLUSION

For the foregoing reasons, the district court had subject-matter jurisdiction over the plaintiff's securities fraud and registration claims.

Respectfully submitted,

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Rule 902(b) for guidance when a foreign fund is engaging in activities that could reasonably be expected to condition U.S. markets such that an offering should not be deemed private. *See* IFIC, 1996 WL 102167 at *11, n.11. The staff will not, however, look to the safe harbor provision of Rule 903 to exclude from the 100-person limitation a person who resides in this country and who purchases abroad, not in a secondary market, but rather from the issuer, its agents or affiliates. *See* Goodwin, Procter 1997 WL 86002 at *15.